

Planned changes to the Nachweisgesetz – Draft bill to implement the Working Conditions Directive

Lena Klever

The [Act on Notifying the Conditions Governing an Employment Contract](#) (Nachweisgesetz, NachwG) obligates employers to record the essential conditions of an employee's employment contract plus any alterations, to sign this record and to provide it to the employee. Until now, this notification obligation only applied to very few basic areas of the contract, such as the names and addresses of the parties, and the date and duration of the employment contract.

At the beginning of April 2022, the German government (Bundesregierung) proposed a draft bill making changes to the Nachweisgesetz. This has given the topic greater significance within wider employment law, as employers would not just be obligated to provide a more extensive written record of the contractual terms but, in future, could even be fined for breaching the Nachweisgesetz. For that reason alone it is worth looking at the planned changes.

Starting point: The Working Conditions Directive

The [draft bill](#) would implement the Directive on transparent and predictable working conditions ([EU Directive 2019/1152](#); "Working Conditions Directive"). This already came into force on 20 June 2019 and replaced the "Notification Directive" from 1991 ([Directive 91/533/EEC](#)), on which the Nachweisgesetz was based until now.

The Working Conditions Directive essentially has three objectives. Firstly, minimum working conditions are to be harmonised across Europe, for example, in relation to the maximum duration of any probationary period, transition to another form of employment and mandatory training. Many of the requirements are already met by German law so only a few changes are required in this area. The second objective of the directive, extending employers' existing obligation to provide information about essential aspects of the employment

contract (notification obligations), is therefore more relevant. For the third and final objective, the directive contains provisions to enforce the aforementioned regulations. These should be enforced by the member states using provisions for criminal or administrative offences.

Changes to the Nachweisgesetz

The German government's discretion when drafting the amended provisions was consequently restricted, as it may not implement anything less than the provisions of the European Union legislature. In some places, the draft bill even went beyond the mandatory provisions of the directive. For employers, the planned amendments could result in significant changes needing to be made when drawing up and making changes to employment contracts. They would soon have to record considerably more content of the contract in writing.

In accordance with the draft bill this would include:

- The duration of the agreed probationary period.
- The agreed breaks and rest periods plus, if shift work has been agreed, the shift system, shift pattern and requirements for shift changes.
- The possibility and requirements of ordering overtime.
- The training entitlement provided by the employer, if any.
- The name and address of the pension insurance provider if the employer provides the employee with an occupational pension scheme via a pension insurance provider.
- The procedure to be observed upon termination of the employment contract, at a minimum the written form requirement as per section 126 German Civil Code (BGB) and the notice periods, plus the time period in which a claim for unfair dismissal may be asserted.

- Information in a general format about any applicable collective agreements and service agreements.
- The draft bill likewise envisages extensive record-keeping obligations in the event of posting of employees abroad.

Information about the dismissal procedure

The extension of the notification obligation to providing information about the dismissal procedure in particular has raised numerous questions. This provision is very extensive in the Working Conditions Directive. In accordance with this, the employer would be subject to the obligation to inform the employee of “*the procedure to be observed by the employer and the employee, including the formal requirements, where the employment contract is terminated*”. These requirements would seem to be almost endless, given the complex conditions of the German dismissal procedure. For example, consider the requirement to consult the Works Council, the Disabilities Officer and the Inclusion Office or the complex procedure for collective redundancies.

The German government’s draft bill is little help here either. It merely sets out the minimum requirements for the notification obligation. As a result, the German government has the issue of deciding to what extent the employer must provide information about the dismissal procedure; nothing has been solved, rather much more has been left open. It will ultimately be up to the courts to clarify this question. Until then, the employer bears the risk of providing less information.

The German government has nevertheless clarified that failure to provide information would have no influence over the notice periods in the dismissal protection process. After the expiry of the three week period the termination is deemed to be legally valid as from the beginning, even in the event of the lack of proper information ([section 7 German Protection Against Unfair Dismissal Act \(Kündigungsschutzgesetz, KSchG\)](#)).

Shorter periods

In accordance with the European provisions, the employer should in part fulfil their notification obligation significantly earlier. To date, the employer has up to one month after the agreed commencement of the employment contract to provide a record of the essential contractual terms in writing. In future, the record of certain information, such as the names of the contractual parties, the amount of salary and the agreed working time, should be handed to the employee on the first

day of work. Changes to the essential contractual terms should, in future, also be provided in writing on the day on which the changes take effect.

For employment contracts that come into force before the planned date that the Act would come into force of 1 August 2022, the draft envisages that the employer would have to provide the employee with this at the employee’s request on the seventh day after the request.

Introduction of an administrative offence

One further reform is the planned introduction of a sanctions regime. Until now, infringements of the Nachweisgesetz could primarily affect the employer in questions of proof.

The draft bill now contains an additional administrative offence. If the notification obligation is not, not properly, not completely, not in the prescribed manner or not complied with in due time, this will be penalised by a fine of up to 2,000 EUR.

Changes to other acts

The draft bill proposes changes to other acts in order to implement the Working Conditions Directive and harmonise EU law.

Employers are now primarily faced with providing reasons in more situations.

With part-time or fixed-term employment contracts in accordance with the [Act on Part-Time Work and Fixed-Term Employment \(Teilzeit- und Befristungsgesetz, TzBfG\)](#), the employer would be obligated to provide the employee who has indicated their request for a change to their employment contract or an employment contract of unlimited duration with their justified response to the employee’s request in text form as per section 126b BGB. The requirement for this obligation to provide reasons would be that the employment contract must have been concluded for longer than six months. In future, the probationary period of fixed term employment contracts would also have to be proportional to the duration of the fixed term and the type of work.

The same obligation to provide reasons would have to be met by hirers under the [German Personnel Leasing Act \(Arbeitnehmerüberlassungsgesetz, AÜG\)](#) if the temporary worker is hired out for at least six months and has indicated they wish to conclude an employment contract. In addition, the notification obligations

with temporary workers would be extended by an obligation to notify the temporary worker of the identity of the hiring company.

The **German Posted Workers Act (Arbeitnehmer-Entsendegesetz, AEntG)** states that, in the event of a posting to Germany, an obligation to inform on the part of the employer would be introduced building on the existing consulting and information services of "**Fair Mobility**".

Finally, the legislature aims to introduce a regulation framework for mandatory training in the **German Trade, Commerce and Industry Regulation Act (Gewerbeordnung, GewO)**.

Outlook

At the beginning of April 2022, the German government passed the draft bill to the German council (Bundesrat) with a request for comments. Time is getting pressing as the member states are obligated to integrate the Working Conditions Directive by 31 July

2022. The rights and obligations laid down in the directive are supposed to apply to all employment contracts no later than 1 August 2022.

No more significant changes to the draft are expected due to the tight schedule and the strict demands of the directive. It is anticipated that employment contracts concluded after 31 July 2022 will have to satisfy the new requirements. In addition, employers will have to adjust with one week to complying with the extended notification obligation within one week for the requests of their employees even with old contracts.

All employers are then recommended to familiarise themselves with the new requirements very promptly and adjust their employment contracts and contract templates as quickly as possible. Otherwise, they may be faced with a fine in addition to the unfavourable impact of providing proof in future. It remains to be seen what consequences the responsible authorities will impose for infringements of the Nachweisgesetz.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Vorname Nachname on +49 221 33660-544 or by email to klever@goerg.de. For further information about the author visit our website www.goerg.com.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstraße 164, 10623 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE

Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

FRANKFURT AM MAIN

Ulmenstraße 30, 60325 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG

Alter Wall 20 – 22, 20457 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH

Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90